ARIZONA TAX COURT

TX 2004-000209
TX2004-000334
(Consolidated for Oral Argument)

07/21/2005

HONORABLE MARK W. ARMSTRONG

CLERK OF THE COURT
C. Danos
Deputy

FILED:_____

ARIZONA STATE DEPARTMENT OF REVENUE, et al.

LISA A NEUVILLE

v.

FRANK BARRETT, et al.

BRIAN J CAMPBELL

JACK B SCHIFFMAN

UNDER ADVISEMENT RULING

This matter was taken under advisement after oral argument held June 6, 2005. The Court has considered the defendants' motion for summary judgment, plaintiff's cross-motion for summary judgment and arguments of counsel.

I. THE ISSUE

The United States Supreme Court held in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), that a state may not tax federal retirees while exempting state retirees. The Court thereafter determined that its *Davis* decision should be applied retroactively. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993). After *Harper*, the Department accepted that *Davis* applied, and began to pay refunds and credits to taxpayers who had filed timely claims for refund.

The issue presented in each of these cases is whether the Defendants, who are retired federal employees, filed timely claims for refund of the Arizona tax that they paid on their federal retirement compensation more than 14 years ago. Absent any tolling of the statute of limitations, none of the Defendants filed a claim within the four-year limitation period specified by A.R.S. §§ 42-1106 and 1104. Defendants argued that the statute of limitations was tolled based on claims filed by three federal retirees, John Bohn, Carl Linton, and Don Rutan (the "Bohn Claimants"). Arizona Department of Revenue ("ADOR") refused to apply the doctrine of tolling, and denied Defendants' claims as untimely. The Defendants then appealed ADOR's denials to the Arizona Board of Tax Appeals ("BOTA").

On appeal to BOTA, Defendants again argued that the statute of limitations had been tolled by the timely administrative and judicial class claims submitted by the Bohn Claimants in *Bohn v. Waddell, infra*, and that their claims were therefore timely. In response, ADOR, citing *McNutt v. Arizona Dep't of Revenue*, 196 Ariz. 255, 995 P.2d 691 (App. 1998), argued class refund claims were simply not permitted under Arizona law and could not toll the statute of limitations for any taxpayer who had not both filed and exhausted his or her own individual administrative refund claim. While the matter was pending before BOTA, the Arizona Supreme Court decided *Arizona Dep't of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862 (2001).

BOTA thereafter issued its decision (the "Decision") on December 16, 2003, ruling:

> "The Department contends that no valid class refund claim has been filed in this matter, therefore, Appellants are not entitled to refunds because they failed to timely file individual, written refund claims. The Board disagrees.
>
> The Arizona Supreme Court has determined that it is proper to use the class device as a vehicle for bringing and exhausting administrative remedies and that it is unnecessary for each taxpayer to file an individual administrative refund claim with the Department in order to participate in a class action refund claim. *Arizona Dep't of Rev. v. Dougherty*, 29 P.3d 862, 200 Ariz. 515 (2001).
>
> After reviewing the complicated procedural history of this case, and in light of the clear ruling in the *Ladewig* decision, the Board finds that a valid class action administrative refund claim was filed on behalf of Appellants when Bohn, et al. filed the Second Amended Complaint with the Arizona Tax Court, on July 18, 1989. Appellants may argue that the June 22, 1989 claim filed with the Department constitutes the class refund claim, however, it is the tax court - and not the Department or this Board - that is authorized to certify a class action under *Ladewig*. Although the Tax Court denied class certification in the Bohn, et al. case at that time, and the case was ultimately dismissed for failure to exhaust administrative remedies, this occurred before the *Ladewig* decision clearly settled these issues."

Decision, at p. 3.

Based upon *Dougherty*, BOTA ruled the tolling period applicable to these Defendants began with the filing of the *Bohn* Second Amended Complaint in Tax Court on July 18, 1989 and

ended when the Court of Appeals issued its decision dismissing the *Bohn* judicial action case on September 29, 1992. *See Estate of Bohn v. Waddell*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). Thus, BOTA concluded the statute of limitations was tolled for 1,169 days. Decision, at p. 4. Although BOTA expressly noted in footnote 5 of its Decision that the Second Amended Complaint "... included the refund claim filed with the Department on June 22, 1989, which asserted a class claim on behalf of all retired federal employees for the years 1984 through 1988," BOTA based its tolling analysis *solely* on the tolling resulting from the Bohn judicial class claim. Following a stipulation between the parties as to when the Defendants had first filed their refund claims, BOTA proceeded to make rulings as to each taxpayer for each year at issue.

ADOR asked BOTA to reconsider its Decision, but BOTA declined. ADOR has appealed to this Court, challenging BOTA's ruling on tolling.

II. FACTUAL BACKGROUND

Defendants timely filed Arizona income tax returns for each tax year at issue in this case (the "Refund Period"). Defendants reported their federal pension income on their tax returns.

The Department included a "Notice to Federal Retirees" and "Notice of Claim" form in the l989 Arizona Individual Income Tax Instruction Booklet. The Department included the Notice of Claim form to provide a simple method for federal retirees who had paid tax to Arizona on their retirement income to preserve their rights to a potential refund of those taxes. The Department mailed the Tax Booklet to every person who filed an Arizona income tax return for 1988. The Department also discussed information concerning potential refunds for federal retirees at public workshops.

Defendants did not file the Notice of Claim form with the Department. Rather, they filed refund claims for Arizona tax that they paid on their federal pension income more than four years after their Arizona income tax returns were due.

III. ARGUMENTS OF THE PARTIES

- Frank Barrett, et al.'s Arguments -

A. BOTA CORRECTLY FOUND THAT TOLLING APPLIES.

Following the U.S. Supreme Court's March 28, 1989, decision in *Davis v. Michigan*, 489 U.S. 803 (1989), three retired federal employees, Jack Bohn, Carl Linton and Don Rutan (the "Bohn Claimants") retained the law firms of Bonn & Jensen (now known as Bonn & Wilkins, Chartered) and O'Neil, Cannon & Hollman, S.C. to represent them in connection with obtaining refunds of taxes Arizona had imposed on their federal retirement compensation. One of the Bohn Claimants' counsel, Brian A. Luscher, testified before BOTA that consistent with the

strategy employed by the two law firms in two other high-profile Arizona tax refund cases, *Kerr v. Killian* and *Ladewig*, the Bohn Claimants' counsel filed class refund claims *both* in Court *and* with ADOR to commence the administrative process.

The *Bohn* administrative class claim was first filed in April 1989, prior to the filing of the *Bohn* judicial class action on May 1, 1989. Although neither ADOR nor the Bohn Claimants' counsel have been able to locate a copy of the initial *Bohn* administrative class claim filed in April 1989, until *just* recently neither ADOR nor any of its contemporaneous counsel ever disputed that an administrative class claim had in fact been filed. Instead, ADOR argued for eleven years that Arizona law did not permit class refund claims of any nature and that a class refund claim could not toll the statute of limitations for any taxpayer who had not both filed *and* exhausted an individual refund claim. These were the same ADOR arguments that were rejected in *Dougherty*.

Mr. Luscher further testified before BOTA that he amended the *Bohn* administrative class claim in June 1989, when the Bohn Claimants' counsel were in the process of amending the *Bohn* judicial class claim. Mr. Luscher explained that on June 22, 1989, he took a copy of the Second Amended Complaint the Bohn Claimants intended to file in the Tax Court case signed and dated it, and then personally delivered it to ADOR with instructions that it be included in the administrative file. The Second Amended Complaint thereafter was filed in Tax Court on July 18, 1989, when Mr. Luscher crossed out the earlier June 22, 1989, ADOR service date and wrote in the new July 18, 1989 service date. The document Mr. Luscher avows he delivered to ADOR on June 22, 1989, fully satisfied the entire claim filing requirements under A.R.S. § 42-1118, and constituted a valid administrative class refund claim for the federal retirees.

Finally, Mr. Luscher also explained to BOTA why the Plaintiffs in the *McNutt* case had not put any evidence of the filing of the *Bohn* administrative class claims into the record of that case: because the filing of the *Bohn* administrative class claim had been admitted by ADOR in its Answer, the *McNutt* Plaintiffs did not believe any evidence was necessary.

BOTA found that an administrative class refund claim was filed in the *Bohn* case on July 18, 1989. The *Bohn* Claimants did not abandon the Bohn administrative class claim until 1994, months after the State conceded liability on July 23, 1993, when it published ITR 93-15 and agreed to pay refunds to the federal retirees. This was *not* less than 296 days *after* BOTA found that any tolling from the *Bohn* judicial class claim had ended.

Finally, whether the *Bohn* administrative class refund claim was first filed in April 1989 or on June 22, 1989 is legally irrelevant: either claim would have started tolling the statute of limitations. Ms. Hudak's Declaration asserts the Bohn Claimants pursued their claims until they reached an agreement with ADOR as to the amount of their refunds on February 18, 1994. Although Defendants contend the *Bohn* claims were not resolved until later that year, they will accept for purposes of this Motion that the Bohn Claimants gave up their claims on February

18, 1994. That is the date tolling ended. The tolling period measured from June 22, 1989 (the latest tolling commencement date) through February 18, 1994 is much longer than the tolling period BOTA used to find in Defendants' favor. Accordingly, Defendants' claims were timely under any analysis.

ADOR's "theory" is that BOTA erred because it based its tolling analysis solely upon the *Bohn* judicial class claim. Citing federal cases construing Rule 23, Fed. R. Civ. P., ADOR now argues no tolling can result from a case, which is ultimately dismissed for a lack of jurisdiction. In making this argument, ADOR attempts to circumvent the even longer tolling period that resulted from the *Bohn* administrative class claim by arguing no administrative class claim was ever filed, misstating a passage in *McNutt* for support. However, *McNutt* provides no support here for several reasons.

First, *McNutt* is of highly questionable authority under any circumstances given the Supreme Court's subsequent ruling in *Dougherty*, which rejected *McNutt's* analysis. *McNutt*, which was authored by Judge Weisberg in 1998, held each taxpayer was required to both file and exhaust an administrative refund claim as a precondition to bringing a refund action in Tax Court. Judge Weisberg followed his *McNutt* analysis when he thereafter issued his decision in *Arizona Dep't. of Revenue v. Dougherty*, 198 Ariz. 1, 6 P.3d 306 (App. 2000) ("Ladewig I"). This is the same analysis that was subsequently rejected in *Ladewig II*. Thus, ADOR's continued reliance upon *McNutt* is simply untenable. Moreover, even assuming, *arguendo*, that *McNutt* had any continuing viability after *Ladewig II*, the factual determinations made therein are not binding on these Defendants, who were not parties in *McNutt*. *See Freemont Indem. Co. v. Industrial Comm'n.*, 144 Ariz. 339, 697 P.2d 1089, 1092 (1985) (holding that a "stranger to a litigation may not be bound by determinations made therein for purposes of subsequent litigation.").

Second, the *McNutt* passage relied upon by ADOR does not hold that an administrative class claim was never filed in *Bohn*. In actuality, the language ADOR relies upon merely states that the *Bohn* administrative claim was not in the *McNutt* record:

> "... the record in this case does not contain copies of the Bohn Claimants' claims. We have no indication that these claims were brought to the tax court's attention in connection with the dispositive motions in the case, and we are accordingly unable to consider their sufficiency as "class claims" for the purpose of this litigation."

McNutt, 995 P.2d at 703. As noted before, Mr. Luscher fully explained to BOTA the reasons why the *Bohn* administrative class claim was not in the *McNutt* record following ADOR's admission in its Answer, and BOTA properly concluded that *McNutt* was inapplicable in reaching its Decision.

Third, in making its argument, ADOR ignores the admissions, controverting testimony, and other documents that confirm the filing of the *Bohn* administrative class claim. In short, *McNutt* is of no efficacy here under any circumstances, and just as BOTA ultimately concluded, there is no evidence in this record that a timely administrative class claim was *not* filed in *Bohn*. That administrative class claim tolled the applicable statute of limitations well beyond the date BOTA used in ruling in Defendants' favor.

B. ADOR BEARS THE BURDEN OF CONVINCING THIS COURT THAT BOTA'S DECISION ON TOLLING WAS IN ERROR.

ADOR has appealed BOTA's ruling in favor of Defendants. ADOR bears the burden of convincing this Court that BOTA's decision on tolling was in error. *See* A.R.S. § 42-1255. Although ADOR disparages BOTA's decision, and points out review here is *de novo*, at a minimum ADOR is required to accurately state the law and facts BOTA considered if ADOR is to carry its burden. In actuality, ADOR does neither. Contrary to ADOR's current argument by counsel and a witness (neither of whom have any firsthand knowledge of the key events which occurred more than sixteen years ago), the Declarations of the two witnesses who do have personal knowledge of the critical facts conclusively establish an administrative class refund claim was filed in the *Bohn* federal retiree case. In fact, ADOR's counsel at the time the *Bohn* administrative class refund claim was filed, Patrick Irvine, expressly admitted this fact to the Arizona Supreme Court on April 26, 2001 while he was arguing *Dougherty*. There is no contrary evidence in this record that would create a material issue of fact. Accordingly, under the ruling in *Dougherty*, which applies here, the Bohn Claimants' administrative class refund claim tolled the statute of limitations for these Defendants, and Defendants' refund claims were all timely. BOTA's ruling was correct.

C. ADMINISTRATIVE TOLLING DID NOT EVAPORATE BECAUSE ADOR FINALLY ACKNOWLEDGED ITS LIABILITY TO THE BOHN CLAIMANTS.

ADOR's assertion that *Dougherty* does not apply here because the Bohn Claimants abandoned their claim in early 1994 (after ADOR acknowledged its tax was illegal in ITR 93-15 and agreed to pay refunds to federal retirees), is also wide of the mark. First, nothing in *Dougherty* suggests that tolling only applies if a claimant fully exhausts and proceeds to class certification. The Opinion unambiguously holds that the statute of limitations is tolled while the claimant exhausts. Second, as the United States Supreme Court's decision in *Crown, Cork & Seal Company Inc., v. Parker*, 462 U.S. at 352-53, makes clear, ADOR's assertion is also contrary to the concepts underlying the tolling doctrine:

> "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; *Rule 23* both permits and encourages class members to rely on the named

> plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S., at 555, 94 S.Ct., at 767; see *United Airlines, Inc. v. McDonald*, 432 U.S., at 395, 97 S.Ct., at 2470. The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification."

Thus, the Supreme Court concluded the statute of limitations is tolled even if the trial court ultimately denies class certification:

> "[3] We conclude, as did the Court in *American Pipe*, that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S., at 554, 94 S.Ct., at 766. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 353-54 (citation omitted)

It follows that if tolling occurs even when class certification is ultimately denied, tolling must apply where a claim is pursued but is ultimately dropped because a defendant finally confesses to his malfeasance and agrees to refund his illegal exactions. To conclude otherwise would not only flout all of the important tax refund public policy considerations recounted by Defendants, it would also contravene the rationale of the well established case law in Arizona holding that the statute of limitations defense is not favored and is strictly construed against the party advancing it. *See, e.g., CDT, Inc. v. Addison, Roberts &. Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 7 P.3d 979 (App. 2000).

D. TOLLING APPLIES HERE UNDER DOUGHERTY.

In an attempt to escape the tolling ruling in *Dougherty* ADOR argues *Dougherty's* ruling was "limited," quoting the portion of the Opinion dealing with the question of whether class administrative refund claims were permitted. The Supreme Court considered that to be the "main" issue before it, because the other issues were only relevant if that "main" issue was answered in the affirmative. After the Court held class refund claims were permitted, and that an administrative class refund claim was a suitable vehicle for exhausting administrative remedies,

the Court went on to address the issue of tolling. Needless to say, if the Court had concluded class administrative refund claims were not permitted under Arizona law, it would not have needed to reach the question of tolling.

Dougherty's ruling on tolling is found in section C of the Opinion, entitled "Tolling the Statute of Limitations." Section C is quoted below, in its entirety, to avoid any dispute over the Court's holding. As can be seen, the Court made it clear it was addressing the issues in sequence:

> "**C. Tolling the statute of limitations.**
> ¶25 Because we vacate that portion of the court of appeals' opinion requiring each member of the putative class to individually exhaust his or her administrative remedies, we must now determine whether the filing of a class administrative claim can toll the statute of limitations for other putative class members. The relevant section of the Arizona tax code is A.R.S. § 42-1106(C) (1999), which states that "failure to being an action for refund or credit within the time specified in this section is a bar against recovery of taxes . . ." However, the statute of limitations is tolled while the claimant exhausts his or her administrative remedies. *See Third & Catalina Assocs. v. City of Phoenix*, 182 Ariz. 203, 207, 895 P.2d 115, 119 (App. 1994). Logic dictates that, if a claimant is allowed to exhaust administrative remedies on behalf of a class of those similarly situated, tolling of the statute of limitations should receive similar treatment. This conclusion, of course, does not apply to those claims already barred at the administrative level by the statute of limitations at the time Ladewig's representative claim was filed. *See* A.R.S. § 42-1106 (1999). WE HOLD THAT ONLY THOSE TAXPAYERS WHOSE CLAIMS WERE NOT BARRED BY the statute of limitations, and who therefore could have filed separate, individual administrative refund claims at the time Ladewig filed her representative claim, and whose administrative remedies were therefore preserved by Ladewig's filing, are not barred by the statute of limitations and may join as members of the class in tax court." (Footnote omitted; emphasized capitals in original.)

29 P.3d at 869-870.

The above quotation conclusively establishes our Supreme Court did more than "suggest" tolling applies - the Court laid down the law on this subject, and the Court did it in a tax refund case. ADOR's mischaracterization of *Dougherty* goes far beyond fair argument.

E. ADOR'S DUTY TO TREAT ITS CITIZENS FAIRLY IS AT LEAST AS IMPORTANT AS THE STATE'S POWER TO TAX.

This Court should consider the public policy of this State, policy considerations ignored by ADOR. As this Court is by now familiar, in *Pittsburg & Midway Coal Mining Co. v. Arizona Department of Revenue*, 161 Ariz. 135, 139, 776 P.2d 1061 (1989), our Supreme Court specifically admonished ADOR that "An honorable government would not keep taxes to which it is not entitled." Similarly, in *Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565, 959 P.2d 1256, 1267 (1998), the Court admonished ADOR that its duty to treat its citizens fairly is at least as important as the State's power to tax:

> "We recognize the fundamental importance of the state's taxing power but believe the state's obligation to treat its citizens justly is as essential to the existence of government as the Legislature's power to levy taxes."

And in *Dougherty*, the Court further stated that "as a matter of policy, we see no reason to set up unnecessary obstacles for those seeking to require the State to refund taxes collected in violation of the constitution." 29 P.3d at 865. ADOR ignores these important policies and judicial pronouncements.

F. THIS COURT HAS NO JURISDICTION TO ENTERTAIN ANY OF ADOR'S CLAIMS IN THESE PROCEEDINGS - The Amount In Dispute In Each Of The Defendants' Cases Is Less Than The Statutory Threshold.

ADOR is relying on an aggregation of several taxpayers' claims, involving several individual years and between 16 to 19 years of separately computed interest to claim that it has satisfied the jurisdictional pre-requisites of A.R.S. § 14-1254. Not one of Defendants' refund claims exceeds the statutory threshold of $5,000.00. ADOR's approach in this case is contrary to ADOR's longstanding construction of the legislative scheme governing Arizona's individual income tax. First, it ignores the principle long advocated by ADOR that in the context of a refund claim each tax year stands on its own and constitutes a unique claim for the year specified. A.R.S. § 42-1118 provides in relevant part: "Each claim shall provide the amount of refund requested, the specific tax period involved and the specific grounds on which the claim is founded." These cases proceeded individually and, while they involve the issue of tolling, were not handled as a class action. Consequently, each of the individual decisions issued by BOTA ordering a refund is for an amount less than $5,000.00 each.

Second, there is no authority authorizing the ADOR to aggregate the amount of the refund claim with the interest now due on that claim to satisfy the $5,000.00 threshold. Interest is simply paid for the use value of money pursuant to statute and is not a component of the refund claim decided in the consolidated cases. See A.R.S. § 42-1123. It is simply added on when the individual refund claim is paid.

Third, A.R.S. § 12-1254 does not authorize ADOR to aggregate individual decisions involving several individual tax years of several different taxpayers as ADOR attempts to do here. The limitations imposed upon ADOR's ability to appeal under this statutory scheme make it unmistakably clear that it applies to a taxpayer and a decision.

- The Arizona State Department Of Revenue, et al.'s Arguments -

A. DEFENDANTS FAILED TO FILE A TIMELY, WRITTEN REQUEST FOR REFUND AS ARIZONA LAW REQUIRES.

Arizona tax refund statutes require timely written claims for refund. A.R.S. § 42-1118. The taxpayer must file the written refund claim with the Department within four years after the return is required to be filed or within four years after the return is filed, whichever period expires later. A.R.S. §§ 42-1104(A) and 1106(A). Defendants concede that, absent tolling, they did not file a claim within this four-year period. Defendants argue, however, that pursuant to the Arizona Supreme Court's decision in *Arizona Dep't of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862 (2001), the Bohn Claimants' refund claim tolled the statute of limitations for all federal retirees, including Defendants. The *Dougherty* decision does not apply here, however, because the Bohn Claimants did not file an administrative claim and exhaust all administrative remedies on behalf of a class of federal retirees.

1. The *Dougherty* Decision Does Not Apply Because It Concerned The Limited Issue Of Which Taxpayers May Be Included In A Certified Class.

The *Dougherty* decision does not apply to this case. The Arizona Supreme Court clearly indicated the limited nature of the issue before it in *Dougherty*, stating that "the main issue before us is quite narrow: Once the tax court judge decides that the requirements for a class action have been met, may the class include taxpayers who have not filed individual administrative claims?" *Dougherty,* 200 Ariz. at 517, 29 P.3d at 864. The court concluded that a taxpayer may use the class device to bring and exhaust administrative claims not already barred by the statute of limitations. *Id.* at 523, 29 P.3d at 870. In the case at issue in *Dougherty*, the Estate of Helen Ladewig filed an administrative class action refund claim and timely pursued that claim through the administrative process until the Tax Court granted class certification. Therefore, the certified class included all taxpayers who could have filed a refund claim at the time that the Ladewig claim was filed.

Unlike the Ladewig claimant, the Bohn Claimants did not file and pursue an administrative class refund claim through to class certification. Rather, the Bohn Claimants filed an action in Tax Court, but the Court denied class certification in a published opinion dated April 6, 1990. *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (Tax 1990), *vacated*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). The court of appeals then determined that the courts lacked jurisdiction to consider the case because the plaintiffs had failed to exhaust their administrative remedies. *Bohn v. Waddell*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). Shortly thereafter, the Court issued its decision in *Harper* and the Department began paying timely filed claims pursuant to Income Tax Ruling 93-15. The Bohn Claimants withdrew their protests and accepted the Department's corrected refund determination as the final disposition of their refund claim.

The Arizona Court of Appeals addressed the history of the Bohn Claimants in *McNutt v. Department of Revenue*, 196 Ariz. 255, 955 P.2d 691 (App. 1998). The Arizona Supreme Court was aware of the *McNutt* decision, but chose to distinguish the case rather than overrule it. *Dougherty*, 200 Ariz. at 519, 29 P.3d at 862. The court interpreted the *McNutt* decision to explicitly state that the Bohn Claimants had not filed an administrative class claim. *Id.*

The burden of proof that a statute of limitations is tolled falls on the claimant. *Troutman v. Valley Nat'l Bank*, 170 Ariz. 513, 826 P.2d 810 (App. 1991). As in *McNutt*, Defendants have not come forward with a document that constitutes the alleged administrative class refund claim. All they present is (1) the Second Amended Complaint in *Bohn v. Waddell*, TX89-00050, dated June 22, 1989 and filed July 18, 1989, and (2) the April 11, 1990, letter to the Department's counsel that was discussed in length in the *McNutt* decision. Defendants cannot satisfy their burden without presenting the Bohn administrative refund claim so that this Court can determine whether it stated a claim on behalf of an alleged class.

The Arizona tax statutes set various deadlines that refund claimants must meet to exhaust the administrative process. The court in *Dougherty* suggested that the statute of limitations is tolled while the claimant exhausts his or her administrative remedies. *Dougherty*, 200 Ariz. at 522, 29 P.3d at 869. That is not actually true for tax cases. Arizona tax statutes require timely written claims for refund. A.R.S. § 42-1118. They also provide that a taxpayer must appeal adverse decisions to BOTA or Tax Court within thirty days after the decision being appealed becomes final. A.R.S. §§ 42-1253 and 1254. Thus, the filing of a timely administrative refund claim would satisfy the statute of limitations, not toll it.

The Bohn Claimants, unlike the Ladewig Estate, did not satisfy the statutory deadlines on behalf of a class and present a properly exhausted case to Tax Court. Defendants assert that the Bohn Claimants' claim was abandoned. The Department asserts that the claims were resolved and the protests withdrawn. In any event, there was a final disposition of the claims and the Bohn Claimants did not pursue a class claim beyond the Department's review. Defendants did not continue the Bohn proceedings. Instead, they filed their own claims after the statute of limitations had run and pursued the Department's denial of those claims through the

administrative process. *Dougherty* does not apply because there was no class claim filed and pursued through class certification.

As with the taxpayers in *McNutt*, Defendants' claims are barred by the applicable statute of limitations. Defendants could have avoided this problem by filing the simple claim form that the Department distributed in the 1989 tax booklets. Defendants, however, failed to file such a protective claim.

2. An Attempt To Apply The *Dougherty* Decision Here Would Create Administrative Havoc.

Defendants' tolling analysis depends on alleged administrative claims filed by the Bohn Claimants, who are not parties to this litigation. The Department is prohibited by law from disclosing confidential taxpayer information. *See* A.R.S. §§ 42- 2001 through 2003. There is an exception that allows the Department to disclose information in a court or administrative proceeding if the taxpayer is a party to the proceeding. A.R.S. § 42-2003(C). In the Ladewig case, the taxpayer who filed the original class refund claim was a party to the litigation. Therefore, the Arizona Supreme Court in *Dougherty* did not face or address administrative difficulties in determining the proper statute of limitations.

The Bohn Claimants are not parties to this consolidated proceeding. Therefore, the Department cannot disclose the actual claims or other taxpayer specific documents in its files. Defendants have also not presented these documents. Therefore, this Court has nothing before it to determine the exact dates the alleged tolling started or stopped. Defendants themselves assert that the lack of public information concerning the Bohn Claimants prejudice taxpayers who do not have intimate knowledge of the prior claims either themselves or through their counsel. Thus, unlike the Ladewig case in which all taxpayers were on an equal footing, here Defendants argue that taxpayers cannot adequately present their case without inside information. The Arizona Supreme Court could not have intended such a result.

The courts consider the practicality, efficiency and convenience of administrative enforcement when interpreting tax statutes. *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 189 Ariz. 79, 82, 938 P.2d 474, 477 (App. 1996) *vacated in part on other grounds* 191 Ariz. 565, 959 P.2d 1256 (1998). The statutes and *Dougherty* decision should not be interpreted to require tolling under circumstances where there is no way to determine the tolling period.

3. BOTA Incorrectly Applied The Tolling Analysis.

Defendants dwell on the decision below from BOTA. The Board's decisions are not binding on the State or this Court. A.R.S. § 42-1004(C). This Court hears appeals from the Board as a trial de novo. A.R.S. § 42-1254(D). Therefore, the Board's decision is irrelevant.

Moreover, the Board's decision in this case was wrong. The Board held that Defendants' refund claims for the Refund Period were timely because the statute of limitations was tolled by the filing of a class action claim in the Arizona Tax Court in *Bohn v. Waddell*, No. TX 89-00050. In that case on July 18, 1989, the plaintiffs filed a Second Amended Complaint, which asserted a class action claim, but the court denied class certification in a published opinion dated April 6, 1990. *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (Tax 1990), *vacated*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). The court of appeals then determined that the courts lacked jurisdiction to consider the case because the plaintiffs had failed to exhaust their administrative remedies. *Bohn v. Waddell*, 174 Ariz. 239, 848 P.2d 324 (App. 1992).

The *Bohn* Second Amended Complaint is insufficient because the commencement of an action in a court that lacks jurisdiction will not toll the statute of limitations. *Star-Kist Foods v. Chicago, Rock Island & Pac. R.R.*, 586 F. Supp. 252 (N.D. Ill. 1984); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976). Therefore, the *Bohn* Complaint could not have tolled the statute of limitations.

Moreover, even if the *Bohn* Complaint could have tolled the statute of limitations, it only remained tolled until class certification was denied. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). The tolling ends when the class certification is denied in the trial court, and does not continue while the appeal of that denial is pending. *See Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378-82 (11th Cir. 1998); *Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 (3d Cir. 1995). Thus, even if the amended tax court complaint filed July 18, 1989, started the equitable tolling, then the tax court's denial of class certification on April 6, 1990, ended such tolling. Thus, the statute of limitations was tolled 262 days, which would extend the statute of limitations for 1986 claims until January 2, 1992, 1987 claims until January 2, 1993, and 1988 claims until January 2, 1994. Therefore, even with tolling, most of Defendants' refund claims would still be untimely.

B. THERE IS NO EVIDENCE OF AN ADMINISTRATIVE CLASS ACTION CLAIM.

Defendants fail to present what they allege constitutes the Bohn Administrative Class Claim. Rather, they repeat the same arguments about the Bohn history that the court considered and rejected in *McNutt*. Without the actual claim, this Court cannot determine for itself whether the document is in fact an administrative class action claim. In *McNutt*, the taxpayers argued that the April 11, 1990, letter from the Bohn Claimants to the Department constituted "a timely and effective administrative class claim." *McNutt*, 196 Ariz. at 267, 995 P.2d at 703. The court found, however, that the letter was not a class claim but rather was intended to "add the names of some 5,000 additional individuals who the Bohn Claimants' counsel then represented." *Id.* Thus, the court reviewed the letter and determined that it was not what the taxpayers claimed it to be. If Defendants in this case actually produced the alleged class claim, this Court could

independently decide if it was a true class claim as Defendants assert, or merely a claim on behalf of certain specified individuals.

Defendants also assert that the Department has the burden to refute Duffy and Luscher's assurances that such a claim was filed. The Department, however, cannot disclose confidential information. *See* A.R.S. §§ 42- 2001 through 2003. Indeed, a knowing disclosure of confidential information is a class 6 felony. A.R.S. § 42-2004. The Department's employees and counsel should not have to commit a crime in order to defend the denial of an untimely refund claim.

Defendants misconstrue the burden of proof statute, A.R.S. § 42-1255. The statute puts the burden on the Department to prove factual issues concerning "the tax liability of a taxpayer" provided that the taxpayers meet certain requirements, such as maintaining proper records and producing such records to the Department. This case does not concern a factual issue concerning the Defendants' tax liability. Rather, the issue is whether their refund claims, admittedly filed more than four years after their tax returns were filed and due, are timely. The burden of proof that a statute of limitations is tolled falls on the claimant. *Troutman v. Valley Nat'l Bank*, 170 Ariz. 513, 826 P.2d 810 (App. 1991). The Department does not have the burden in this *de novo* appeal to overcome BOTA 's decision.

C. THIS CASE IS GOVERNED BY *MCNUTT* AND NOT *DOUGHERTY*.

Even if the Bohn Claimants filed an administrative class claim, the statute of limitations was not tolled because the claim was dismissed. The Arizona Court of Appeals addressed the history of the Bohn Claimants in *McNutt*, including the assertion that the Bohn Claimants had filed an administrative class claim. 196 Ariz. at 267, 955 P.2d at 703. The court, however, held that the taxpayers' claims were barred by the statute of limitations because they were not filed within four years of when their tax returns were filed or due. *Id.* At 258, 955 P.2d at 694. The Arizona Supreme Court was aware of the *McNutt* decision, but chose to distinguish the case rather than overrule it. *Dougherty*, 200 Ariz. at 519, 29 P.3d at 862. Contrary to Defendants' assertion *McNutt* is still good law. If the Arizona Supreme Court had intended to reject the *McNutt* holding, it would have overruled the case.

The Arizona courts have never held that an abandoned refund claim has any effect on other taxpayers. In *Dougherty*, the court merely noted that the statute of limitations was tolled while the claimant exhausts his mandatory administrative remedies. That statement was based on the decision in *Third & Catalina Associates v. City of Phoenix*, 182 Ariz. 203, 207, 895 P.2d 115, 119 (App. 1994). The statute of limitations in that case provided that an action challenging the constitutionality of an ordinance had to be filed within four years of the date the ordinance was adopted. The plaintiff had filed an administrative action within the four-year statute of limitations, but the appeal to the superior court was filed after the expiration of four years because of the time it took to exhaust the administrative remedies. The court held that the appeal

was not time barred because the statute of limitations was tolled while the plaintiff exhausted its administrative remedies. In contrast, the statute of limitations in this case concerns the date by which a taxpayer must file an administrative refund claim. Thus the filing of an administrative claim satisfies the statute of limitations it does not toll it.

Moreover, the courts in *Dougherty* and *Third & Catalina* did not discuss what happens if the claim is abandoned before reaching the courts. Generally, claimants need a savings statute to resurrect a claim that is voluntarily abandoned. *See* A.R.S. § 12-504. There is no support for Defendants' assertion that an abandoned administrative claim tolls the statute of limitations. The cases upon which Defendants rely concern situations where class certification is denied, not where the claim is abandoned during a confidential administrative process.

Defendants are in an identical position to the taxpayers in *McNutt.* The Arizona Supreme Court expressly chose to distinguish rather than overrule the *McNutt* decision. Therefore, *McNutt* is still good law and applies here. Unlike in *Dougherty,* no taxpayer filed and pursued a class action claim on behalf of all federal retirees through the administrative process to class certification. Therefore, the Arizona case law supports the Department's denial of Defendants' untimely refund claims.

D. THIS COURT HAS JURISDICTION TO CONSIDER THE DEPARTMENT'S COMPLAINTS IN THESE CASES.

Defendants assert that A.R.S. § 42-1254(B) prohibits the Department from challenging a BOTA decision requiring the Department to pay over $450,000 in refunds because the amount of tax alone for each taxpayer does not exceed $5,000 for a single year. The statute does not limit the Department's right to appeal to those claims exceeding $5,000 in tax. Rather the language that the Legislature used is "if the department is aggrieved by a decision of the board and the amount in dispute is less than five thousand dollars, the department may not bring an action in tax court unless the department determines that the decision of the board involves an issue of substantial significance to the state." A.R.S. § 42-1254(B).

Defendants' interpretation of the statute is not logical. Why permit the Department to appeal a decision involving only $6,000 in tax that happens to involve one year and not allow it to appeal a decision involving $18,000 in tax just because it involves four years? The rational interpretation of the legislative intent is that the Legislature did not want the Department to appeal cases where expense of the appeal would outweigh the amount at issue. That is not a problem in this case. The amounts at issue in this case far exceed the expenses incurred in these proceedings.

In this case, the Board issued a consolidated decision, not individual decisions. The amount in dispute under that decision totaled over $450,000. This is not a small case. The prohibitions of A.R.S. § 42-1254(B) do not apply.

Moreover, the issue has tremendous significance. It is the first case to consider whether *Dougherty* applies when a class is not certified. While Defendants assert that *Dougherty* controls, the Department is not bound by that assertion, especially in light of the Arizona Supreme Court's decision to distinguish rather than overrule *McNutt.* The fact that the Department and Defendants do not agree in their interpretation of the case law does not make the Department's position frivolous.

IV. THE COURT'S FINDINGS AND CONCLUSIONS

The Court must first decide three threshold issues: (1) whether this Court has jurisdiction; (2) whether the defendants' timely filed tax returns constituted timely refund claims; and (3) what is the standard of review. The Court finds that it has jurisdiction based on the aggregate amount of the consolidated claims and because the case involves an issue of substantial significance to the State. A.R.S. § 42-1254(B). The Court further finds that the standard of review is *de novo*. A.R.S. § 42-1254(D). Even the defendants admit that the Board's decision was incorrect to the extent it based tolling on a judicial action that was later dismissed for lack of jurisdiction. Instead, defendants argue that the 4-year statute of limitations was tolled for them between the filing of a Bohn administrative claim on June 22, 1989, and their agreement with ADOR on the amount of their refunds on February 18, 1994, when the administrative claim was either resolved or abandoned. Finally, the Court finds that the defendants timely filed tax returns did not constitute timely refund claims.

The Court further finds that defendants presented substantial evidence that a class administrative claim was filed by the Bohn claimants on June 22, 1989. Although the claim cannot be found, it appears to have been substantially in the form of the Second Amended Complaint filed with the Tax Court on July 18, 1989. For purposes of these motions, the Court finds it more likely than not that such a class administrative claim was filed. The language from the *McNutt* case relied upon by ADOR is not dispositive on this issue since the *McNutt* court merely stated there was no evidence of an administrative class claim in that case, not that no administrative class claim had been filed.

Even so, this finding of a class administrative claim is not dispositive of the tolling issue under all the facts and circumstances. Significantly, the Tax Court denied class certification in the Bohn case on April 6, 1990, and the Bohn judicial action was subsequently dismissed for lack of jurisdiction. As stated above, the Bohn administrative claim was either resolved or abandoned no later than February 18, 1994. It really does not matter to this Court's disposition whether the Bohn claims were deemed abandoned or resolved. In either event, any class administrative claim was extinguished at that point. The defendants in this case were not named in and did not benefit from the resolution of any Bohn class administrative claim. They all filed their refund claims separately, in some cases before and in some cases after the resolution or abandonment of the Bohn class administrative claim.

The Supreme Court held in *Dougherty* that a class administrative claim may toll the statute of limitations for all putative class members. What is not made clear from *Dougherty* is what result obtains if the administrative class claim as here is resolved or abandoned. The court in *Dougherty* did not discuss what happens if the claim is resolved or abandoned before reaching the courts. Nor has any other court.

In *Dougherty,* the Estate of Helen Ladewig filed an administrative class action refund claim and timely pursued that claim through the administrative process until the Tax Court granted class certification. Therefore, the certified class included all taxpayers who could have filed a refund claim at the time that the Ladewig claim was filed.

Unlike the Ladewig claimant, the Bohn claimants did not file and pursue an administrative class refund claim through to class certification. Rather, the Bohn claimants filed an action in Tax Court, but the Court denied class certification in a published opinion dated April 6, 1990. *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (Tax 1990), *vacated*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). The court of appeals then determined that the courts lacked jurisdiction to consider the case because the plaintiffs had failed to exhaust their administrative remedies. *Bohn v. Waddell*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). Shortly thereafter, the Court issued its decision in *Harper* and the Department began paying timely filed claims pursuant to Income Tax Ruling 93-15. The Bohn claimants withdrew their protests and accepted the Department's corrected refund determination as the final disposition of their refund claim no later than February 18, 1994.

The Court simply does not believe that the Supreme Court in *Dougherty* could have intended the result sought by defendants here. The Court certainly has sympathy for the defendants in this case who were taxed unconstitutionally. As defendants have noted, public policy supports the fair treatment of taxpayers by their taxing authorities. But public policy also supports requirements for timely and orderly presentation of claims so that the State may act fairly while preserving the public fisc for public use.

The Court finds that there are no genuine issues of material fact and plaintiffs are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED granting plaintiffs' motion for summary judgment.

IT IS FURTHER ORDERED denying defendants' motion for summary judgment.